

ZONING BOARD OF ADJUSTMENT PUBLIC HEARING AND MEETING  
March 22, 2016

A public hearing of the Zoning Board of Adjustment was held on Tuesday, March 22, 2016 at 6:30 PM in Room 208, City Hall.

Members in attendance were:

Gerry Reppucci, Chair  
Jack Currier, Vice Chair  
J.P. Boucher, Clerk  
Mariellen MacKay  
Rob Shaw

Carter Falk, AICP, Deputy Planning Manager/Zoning

Mr. Reppucci explained the Board's procedures, including the points of law required for applicants to address relative to variances and special exceptions. Mr. Reppucci explained how testimony will be given by applicants, those speaking in favor or in opposition to each request, as stated in the Zoning Board of Adjustment (ZBA) By-laws. Mr. Reppucci also explained procedures involving the timing light.

- 1. James A. & Marilyn H. Forest, d/b/a NCC Business Solutions (Owner) Friendly's Ice Cream, LLC (Applicant) 149 Daniel Webster Highway (Sheet A Lot 746) requesting variance for minimum stacking lane distance, 160 feet required, 153 feet proposed - to re-establish a drive-through lane with associated site improvements. GB Zone, Ward 7.**

Voting on this case:

Gerry Reppucci  
Jack Currier  
J.P. Boucher  
Mariellen MacKay  
Rob Shaw

Gordon Leedy, VHB, Bedford, NH. Mr. Leedy introduced the project, stating that Friendly's used to have a drive-thru in the past, and after they did some internal renovations, it was removed. He said that the current plan is to re-establish the drive-through lane as shown in the attached exhibits.

Mr. Leedy said that they need 160 feet of stacking lane space, and 153 feet exists. He said that it would not be a reasonable expectation to alter the entrance driveway to the Friendly's

site and move it over by seven feet, just to meet the stacking. He said that 160 feet will accommodate eight cars, and the 153 feet will easily accommodate seven cars. He said that Friendly's has studied other sites, and the most cars they get in peak hours is eight cars per hour.

Mr. Falk said that their business model indicates that the drive-through menu is limited, and you just can't drive up there with a family and order full menu items, their kitchen can have your order ready in four minutes or less.

**SPEAKING IN FAVOR:**

No one.

**SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:**

No one.

**MOTION** by Mr. Reppucci to approve the variance application as advertised on behalf of the owner. Mr. Reppucci said that the variance is needed to enable the applicant's proposed use of the property, and given the special conditions of the property, and the benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than the area variance.

Mr. Reppucci said that the request is within the spirit and intent of the ordinance, and that it will not adversely affect the property values of surrounding parcels.

Mr. Reppucci said it is not contrary to the public interest, and substantial justice is served to the owner, as Friendly's previously did have a drive-through years ago, and it is a very minor reduction in the required stacking space length.

**SECONDED** by Mr. Currier.

**MOTION CARRIED UNANIMOUSLY 5-0.**

**2. Donna Szydlowski (Owner) 28 Dickerman Street (Sheet 119 Lot 79) requesting variance to encroach between 2'-5" and 3'-3" into the 10 foot required right side yard setback to construct an attached 14'x23' carport. RA Zone, Ward 7.**

Voting on this case:

Gerry Reppucci  
Jack Currier  
J.P. Boucher  
Mariellen MacKay  
Rob Shaw

Donna Szydlowski, 28 Dickerman Street, Nashua, NH. Mrs. Szydlowski said that she recently bought the house, and wants to construct a 14'x23' carport. She said she originally wanted a garage, but decided to install the carport instead, as it's less intensive than the garage. She said that the carport won't have any negative effect to the neighborhood. She said there are other structures in similar locations in the neighborhood. She said that there isn't any adverse public interest, nor are there any adverse public safety issues, because it'll be used for personal property.

Mr. Currier said that the topography drops off in the back.

Mrs. Szydlowski said that further down in the back, there is a large slope, so trying to build anything further back would be almost impossible.

Mr. Currier asked if she has spoken with the neighbor on the right side.

Mrs. Szydlowski said that she did talk with them, and there were issues with the closeness to their property. She said that she's made some changes with the drainage to help out, as a lot of water drains down from Fifield Street, and their property is higher, so any water that drains down goes into her driveway and foundation, so as part of this project, the proposal is to put in a drainage area that would take care of that.

**SPEAKING IN FAVOR:**

No one.

**SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:**

Attorney Israel Piedra, representing owners at 30 Dickerman Street, Nashua, NH. Atty. Piedra passed out some information to the Board members. He said that the first page is a survey prepared by Mrs. Szydlowski, and shows the close proximity of the carport to the property line, and it's supposed to be a ten foot side yard setback. He said that an essential issue is that the neighbor's house is only four feet from the lot line between the two properties. He said that if the variance is granted, there will be ten feet, or less, between the two structures themselves. He said that the purpose of setbacks is safety, so there wouldn't be concern over the spreading of fires. He said that these houses would be less than ten feet away from one another; there is a much more substantial greater chance of a fire spreading from house to house. He said that the second reason is that people are just not on top of one another, that they're happy and healthy, and the welfare is greater, and that they have space to live in and enjoy their homes, with adequate air and light.

Atty. Piedra said that in the second page of his packet, there are statutory requirements for zoning ordinances, and it states that they're supposed to ensure safety and help from fire, and to promote general health and welfare, adequate air and light. He said that by granting this variance it would strongly infringe upon these.

Atty. Piedra said that the spirit and intent of the ordinance is to carry out these goals in the statute, and if the variance is granted with these structures less than ten feet away from one another, these goals will not be met. He said that Mrs. Szydlowski wants is just more convenient access to her car and snowblower, versus the dangers that could be there. He said that there will be diminished value, and the whole point of setbacks is to protect these things previously mentioned, and the variance request would greatly impact the public purpose of setbacks.

Atty. Piedra said that the third item is the photo of the back of Mrs. Szydlowski's property, and they contend that there is enough room there that she could pave or create a structure that she could put her snowblower there, so it's a clear alternative, and she wouldn't need a variance for that.

Mr. Reppucci asked if Atty. Piedra's client's property was a pre-existing nonconforming use.

Atty. Piedra said that their house was built in 1954.

Mr. Reppucci said that as far as the space between the properties, the applicant would be at least twice as far to the property line than his client's house.

Atty. Piedra said that by granting the variance, the Board would be decreasing what is already a less than minimal distance, which is in contrast to the safety of the ordinance. He said it would be decreased by 30%, and although this would be more convenient to Mrs. Szydlowski, it would be done at the cost of the safety barrier between their houses.

Mr. Reppucci said that the proposal is for a carport, it's not a full garage structure, and asked if the carport is less safe than a garage.

Atty. Piedra said it is less safe, it will be much closer to his client's property than what exists now, which makes it exponentially easier for a fire to jump from property to property.

Mr. Currier asked to verify the distance of 30 Dickerman Street to the property line.

Atty. Piedra said he can only estimate, based upon the survey of 28 Dickerman, and it looks to be about four feet.

Mr. Currier said that one of the challenges is the water flow. He said it's essentially channeled over, because of the encroachment, so that the water is being pushed over onto 28 Dickerman. He said that Atty. Piedra's client actually benefits from this, as it will be graded to go around. He said that one of the reasons for a side yard setback is for sheet flow of surface drainage to go, and she's going through the expense of the upgraded drainage.

Mr. Shaw said that Atty. Piedra's client has had the benefit of having their house encroaching 6 feet into that 10 foot side yard setback, and that the argument is based upon having the two ultimate structures too close, yet, hasn't heard reasons why Mrs. Szydlowski cannot be able to also come up to four feet within the property line.

Atty. Piedra said that both of these property owners bought their properties knowing that they had these setbacks, and said that his client would prefer to have the full ten foot setback, so they don't believe it's an advantage. He said that just because one property in the neighborhood is in violation of the setbacks, it shouldn't mean that other properties should also violate the ordinance. He said that setbacks are designed to prevent dangers which have already been outlined.

**SPEAKING IN FAVOR - REBUTTAL:**

Mrs. Szydlowski said that one of the reasons why she went with the carport versus the garage was because of the closeness of the property, and it would be more open, less confining, and less invasive to both properties. She said that in this climate, winters in particular, it's not a frivolous thing to have a carport to store your car, and to have easier access to it in bad climate. She said that she's only asking for 2-3 feet and there will be a much wider space on her lot, and doesn't think it's fair that just because the house next door is so close, that she can't pursue this variance.

Mr. Currier asked if it's a one-story carport.

Mrs. Szydlowski said it would be, and would follow the line and roof of the house.

Mr. Currier asked what the drainage improvement design would be.

Mrs. Szydlowski said that originally, they were going to put in a retaining wall along the lot line, with a French drain underneath, so that when the water comes down the slope, it will go into the French drain and drain out towards the front if it's minimal, or if it's a heavy rain, there would be a pipe going back towards that downslope in the back, so the water would run there. She said after talking to the neighbors and hearing their concerns about drainage so close to the property line, the contractor has talked about moving it closer to the carport, so it'd be six or seven feet away, and the drainage would be along the carport, and try to alter the slope of it so that it wouldn't be steep there.

**SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS - REBUTTAL:**

Atty. Piedra said that Mrs. Szydlowski is going about this as a matter of personal preference, and one of the important things about variances is that they run with the land, and by definition, they are granted to a piece of property, not with respect to the person who needs a property owner. He mentioned a court case of someone who wanted to build a garage on their property, it was Crossley v. Pelham, 133NH215, from 1990. He read some information from the case.

Mr. Reppucci said that what he just heard is more of a Governor's Island standard, he said that the standards for variances were significantly different in the pre-Simplex time period than it is now. He said the standards have changed significantly.

Atty. Piedra said that he is aware that the standards have changed over the past couple decades, but there are some parts that haven't.

Mr. Currier said that he didn't believe the case mentioned by Atty. Piedra was applicable to the current request. He said that the fact that the applicant is making the drainage situation better, he is feeling supportive of the application. He said that there is an incursion of about 6 feet on the neighbor's property, and finds it hard to not allow an incursion of up to 3 feet on this side.

Mrs. MacKay concurs with Mr. Currier, the applicant has tried to be amenable to the neighbor, and has taken into consideration the concerns and objections, and was willing to find a solution. She said that the real issue is more with 30 Dickerman than 28 Dickerman, and is inclined to support the application.

Mr. Shaw also agreed. He said that the applicant originally wanted to put in a garage, and in hearing some sensitivity by the abutter, decided to go to a carport, a much less imposing type of structure. He said he's also in favor of the application.

Mr. Boucher said that the carport is not living space, and agrees with other members comments. He said that if the carport was three feet narrower, and fell within the setback, he didn't feel that the safety issue would be better. He said that the drainage will actually be helping the neighbor's property, and is in support of the application.

Mr. Reppucci said it was a well presented case on both sides. He said that everyone focused on the points of the law. He said that he supports the case. He said that the applicant has gone out of her way to help resolve issues, and make it work. He said that the request, and the reasons for it, are a genuine request, the winters here are tough, and the request is reasonable, and meets the current hardship tests.

Mr. Currier said that in comparing a carport versus a garage, it's a much less of a fire issue. He said that there are garage fires every year that you hear about, but with a carport, it's like a driveway with a roof over it, it would be a lot easier to fight and stop a fire over than an enclosed garage.

**MOTION** by Mr. Currier to approve the variance application as advertised on behalf of the owner. Mr. Currier said that the variance is needed to enable the applicant's proposed use of the property, which is a one-car carport with a little extra space for storage of yard appliances. He said that given the special conditions of the property, which is that there is a topography challenge, and the property on this street is going downhill towards the street and downhill towards the back, and the benefit sought by the applicant is reasonable to have a shelter for their car, also, to mitigate a water problem that the applicant has by creating a French drain on the outbound side of the proposed carport. He said that another special condition is that the abutting property is within the setback about six feet, and the Board finds that that is a special condition, it might be exacerbating the water problem found in other properties right nearby in the neighborhood, therefore, to allow this side yard setback encroachment is within the spirit and intent of the ordinance, and that it will not adversely affect the property values of surrounding parcels.

Mr. Currier said it is not contrary to the public interest, and substantial justice is served to the owner for the carport.

Mr. Currier added a special condition that it will be a one-story carport, not a garage.

**SECONDED** by Mrs. MacKay.

**MOTION CARRIED UNANIMOUSLY 5-0.**



**3. Sandey Ndegwa (Owner) 3 Kennedy Drive (Sheet A Lot 731) requesting the following: 1) special exception to convert an existing single-family home into a two-family home, and; 2) variance for minimum lot area, 10,000 square feet existing, 14,520 square feet required. RA Zone, Ward 7.**

Voting on this case:

Gerry Reppucci  
Jack Currier  
J.P. Boucher  
Mariellen MacKay  
Rob Shaw

Mr. Sandey Ndegwa, 3 Kennedy Drive, Nashua, NH. Mr. Ndegwa said that the house is a split-level entry house. He said the lower level was an in-law unit, which is 1,440 square feet, and has it as an empty space, and would like to close it and use it as a rental. He said it's all completed, it's an existing finished unit, and there is adequate parking space, and there shouldn't be any problems to the surrounding neighborhood, nor will there be any safety problems. He said he lives on the second level of the house. He said it shouldn't diminish the property values of the surrounding houses.

Mr. Shaw asked if when the house was purchased, was the in-law unit used.

Mr. Ndegwa said that he bought the property last year, and found out through the neighbors that the lower level unit was being rented to the owners sister, so it was used as an in-law apartment. He said he came to the City to verify if it was a legal unit, or what he can do to make it a legal unit. He said he determined that it was not a legal unit, so he is pursuing it to be a legal unit to have a tenant. He said it is empty and has not been rented to anyone.

Mr. Shaw asked how it was advertised when he bought it.

Mr. Ndegwa said it was advertised as a single-family.

Mr. Reppucci asked if Mr. Ndegwa has ever rented the unit before.

Mr. Ndegwa said no.

Mr. Reppucci said that the property was granted a stipulation as an in-law back in 1978, it was for a group home, with no more than four children living in the home. He said that at that time, the City considered the four children as family.

Mr. Shaw said that on the assessing sheet, it was converted from two units to one unit.

Mr. Reppucci said that in 2010, the property owner came to the City and said that it's a single-family, not a two-family, and the assessing department corrected it.

Mr. Currier asked about the fluctuation in assessed values over the years.

Mr. Falk said that a lot of that is market-driven, and the Planning Department really has no say or jurisdiction on these types of financial matters. He said that although the past history is interesting, the Board should focus on the submitted application.

Mr. Currier asked if there are other two-family homes in the neighborhood, and asked if he had any data on that.

Mr. Ndegwa said that the house on the left, on South Main Street, is a multi-family home, but they're using it as a single-family home. He said his neighbor built a garage, with a unit on top.

**SPEAKING IN FAVOR:**

No one.

**SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS:**

Arthur Graves, 4 Kennedy Drive, Nashua, NH. Mr. Graves said that 3 Kennedy was originally a garage, then it was converted to a space for the foster children. He said that over the years, different owners have used the space for different reasons. He read a statement into the record, stating that to his knowledge, it's only single-family uses on Kennedy Drive. He said that the building next to 3 Kennedy was denied a special exception for a two-family. He said he's spoken with the applicant about his concerns. He said that when the house on the corner was being

built, they put in two front doors, and they wanted a special exception for two units. He said that right now, only one family lives there.

Mr. Reppucci asked about the requirement for a special exception to allow a two-family in this zone.

Mr. Falk said that in the RA zoning district, to allow a two-family, it must be approved through approval from the Zoning Board as a special exception. He said that they also need a variance, as they need 7,520 sq.ft of land per unit.

Ken Gray, 5 Kennedy Drive, Nashua, NH. Mr. Gray said he's the one that built the garage next door with the unit above. He said that this Board approved it last year. He said he is not supportive of two-family homes in the Kennedy Drive/South Main Street area, as it would set a precedent, there are a lot of elderly people in the neighborhood. He said it was fair that he had to fill out the paperwork stating that he'd abide by the rules of the accessory dwelling unit. He said he didn't want to see Kennedy Drive turn into a rental property haven. He said that the applicant has done a beautiful job with the property.

Doug Goodwin, 6 Kennedy Drive, Nashua, NH. Mr. Goodwin said he'd have no problem if he wanted to turn it into an in-law apartment, but is not supportive of it being two-family or multi-family.

Mr. Reppucci said that if the Board is of the mind to grant the request, he said that the Board cannot stipulate that they have to live there.

**SPEAKING IN FAVOR - REBUTTAL:**

Mr. Ndegwa said that he doesn't have any family members that would be available to live in the unit. He said his intent is to live there for a long time and likes the neighborhood.

**SPEAKING IN OPPOSITION OR WITH QUESTIONS OR CONCERNS - REBUTTAL:**

Mr. Gray said that there are a bunch of single-family homes with in-law apartments, legal and illegal, around the area, and would like to see it stay that way.

Mr. Reppucci said that in his mind, this is sort of a unique situation, where the property is set up for a reason, thirty years ago, and it's not really practical now. He said it's not the conventional in-law apartment that he's used to seeing. He said he wasn't aware that the Code allowed two-family's as special exceptions in the RA zone. He said that this zone allows two-family units, provided they meet the criteria of the area. He said if it wasn't for the size of this lot, it's all permitted as a special exception. He said that the two-family is allowed as a special exception, he just needs the variance for the land area.

Mr. Falk said that in-law apartments have more regulations than two-family units have, as they're restricted to use, and size, and other building criteria.

Mr. Currier said that he's always felt that a two-family is a much higher bar than an in-law, as an in-law is the same family, and there are shared resources too. He said that the land area is 40% lower than required for square footage, which isn't trivial. He said that the owner bought the house, as advertised, as a single-family home, and is taxed that way. He said that the evidence we heard is that Kennedy Drive is a single-family neighborhood, and that this is a departure from it. He said he'd have complete support for an in-law, and is struggling to find support for a two-family.

Mr. Reppucci said that it's significant for him that it's a special exception, not a variance. He said it's really almost just a land area relief. He said he'd be willing to look at it as a permitted use as long as it has the land area.

Mr. Shaw said that he's heard that the character of the neighborhood is a single-family in nature. He said that the area difference is pretty significant, if it was something like a few hundred square feet, he may feel different about it, but this is a pretty big difference, it's not close to the intended criteria. He said that having the owner live in the structure is a good thing, and satisfactory to most of the parties involved, but said that our hands are tied, in that we can't pursue that. He said that he's not coming down on the side of approving it.

Mr. Reppucci asked if it mattered about the property on the corner, if it were a multi-family use. He suggested taking

another look at this, if that's what the standard for the neighborhood is. He asked if the house next door was a two-family, if that would change the perspective.

Mr. Shaw said that there was an attempt to pursue an approval of that as a two-family structure, but it never was approved. He said that the first attempt to try to institute a multi-family structure in the neighborhood, perhaps wasn't successful already. He said it wouldn't be enough to sway him.

Mr. Reppucci said that he doesn't feel that he understands the actual neighborhood, and doesn't know that if this request is in fact out of the character with the neighborhood. He said that he's heard that there are some in-law apartments in the neighborhood, some legal and some not legal. He said that if there are no multi-units in the area, he'd have a lot more support for denying the application. He said it'd be no harm in getting the facts on that. He suggested that the Board could table this request until there is more information about the neighborhood, as an option.

Mr. Currier said that his feeling is that the South Main Street properties are different from the Kennedy Drive properties. He said that the side streets are different. He said he's looking more at the Kennedy Drive properties, as the folks who live on Kennedy don't want to be on the main street, they want to be more on the quieter side street with less traffic. He said that it's the applicants burden to provide information, it's not up to our Board to seek out and answer whether there are single-family or two-family units in the area. He said that usually, applicants provide us a colored map showing what units are around.

Mr. Reppucci said that we just don't have any data that says that there are no two-families.

Mr. Boucher said he agrees with what has been said. He said that this is a special exception, and we're looking at the square footage of the lot. He said that parking is more than adequate. He said that if he were an abutter, he'd be concerned if the property was sold, and who would own it. He said it's apparent that all the neighbors get along, and they're concerned if Mr. Ndegwa leaves, or sells the property, but we don't know what that is. He said that it appears as if the neighbors are concerned about the future of the property if he sells it.

Mr. Reppucci reiterated that it's important to know if the property abutting the subject property is a multi-family by right.

Mr. Currier said he's not supportive of the request, with the big factor of the lot square footage that far under the code. He suggested a tabling to get specific information on the homes on the street, and Waltham Street and some of the other streets that are right there. He said he'd be in favor of tabling to get that specific information, because that information might be impactful.

Mrs. MacKay said that she concurs, and agrees with the tabling to get additional data. She said she'd like to know, and is very conflicted on how she'd vote, and this data could and will help cement her determination and decision.

Mr. Shaw said he'd support the tabling of the request.

Mr. Currier said that we'd be seeking data for legal two-family units, not for illegal units.

Mr. Reppucci said he'd just like to see all the data.

Mr. Shaw said he wanted to ask the applicant if he is willing to do this and collect this data.

Mr. Reppucci said that he wants information that will show that the request is consistent with the character of the neighborhood, and doesn't know that now. He said he even has no problem digging into this himself.

Mr. Falk said that the next meeting is on April 12<sup>th</sup>. He suggested asking if the applicant will be in town, and is available to supply this information. He said that City staff can help him out, but in reality, it is really up to the applicant to provide this data.

Mr. Reppucci said that the applicant has presented his case and is trying to do the right thing, there is no effort to deceive anyone, the history of the property is clear, and the applicant is trying to do things the right way, he was never caught by Code Enforcement or anything like that.

**MOTION** by Mr. Reppucci to waive the rules and allow the applicant to speak to tabling the case.

**SECONDED** by Mr. Shaw.

**MOTION CARRIED UNANIMOUSLY 5-0.**

Mr. Ndegwa said he'd go with April 12<sup>th</sup>. He asked how he'd get this information.

Mr. Reppucci said he can talk to Mr. Falk, or the Assessor's Office, drive around and take pictures, look at the neighborhood. He said that the Assessor's Office has a lot of public data that he'd have access to.

Mr. Graves said that if you're going to take a picture of the place next door, it looks more like a dentist office, the previous owner had a ranch built.

Mr. Reppucci said that the re-opening of the public hearing is only to discuss the tabling of the case to April 12<sup>th</sup>. He said that he could present information to the Board as well.

**MOTION** by Mr. Reppucci to table the request to the April 12, 2016 meeting, it'll be the first case on the agenda, and the Board will re-open the public hearing.

**SECONDED** by Mr. Shaw.

**MOTION CARRIED UNANIMOUSLY 5-0.**

**MISCELLANEOUS:**

**REGIONAL IMPACT:**

Mr. Falk said that there is an extra week in the schedule, and there are at least nine cases so far.

Mr. Reppucci said since it could be a long meeting, he asked about the availability to continue, if necessary, on the next night, Wednesday the 13<sup>th</sup>.

Mr. Reppucci said that the best thing is to keep it open as an option.

**REHEARING REQUESTS:**

None.

**MINUTES:**

2-23-16:

**MOTION** by Mr. Currier to approve the minutes as presented, waive the reading, and place them in the permanent file.

**SECONDED** by Mr. Reppucci.

**MOTION APPROVED UNANIMOUSLY 4-0.** (Mrs. MacKay abstained)

**ADJOURNMENT:**

Mr. Reppucci called the meeting closed at 8:47 p.m.

Submitted by: Mr. Boucher, Clerk.

CF - Taped Hearing